No. 77-495

In the Supreme Court of the United States

OCTOBER TERM, 1977

MANFRED SWAROVSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 557 F. 2d 40. The opinion of the district court (Pet. App. 24a-63a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1977. A petition for rehearing was denied on August 3, 1977 (Pet. App. 23a). By order of August 26, 1977, Mr. Justice Blackmun extended the time for filing a petition for a writ of certiorari to and including September 30, 1977; the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Customs agents had authority under New York law to arrest petitioner for a federal felony committed in their presence.

2. Whether any alternative ground supports the district court's order suppressing the statements petitioner gave after being arrested.

STATEMENT

A two-count indictment filed in the United States District Court for the Eastern District of New York charged petitioner with attempting to export military equipment without the required State Department license, and with conspiracy to do so, in violation of the Munitions Control Act.[1]

1. The facts brought out at the hearing on petitioner's motion to suppress evidence are summarized by the district court (Pet. App. 26a-34a) and the court of appeals (*id.* at 3a-5a). In March 1975 Photo-Sonics, Inc., a California firm that manufactures a gunsight camera for use on military fighter planes, notified the government that it suspected that one of its cameras, ostensibly purchased by Swarolite, Inc., a Tennessee corporation, was destined for export without the required export license. Cooperating with federal agents, Photo-Sonics sent the camera to Tennessee; Customs agents observed James Sproul retrieve the package. The agents followed Sproul to a nearby motel, where he delivered the package to petitioner.[2]

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[1]22 U.S.C. 1934(c), as implemented by Part I of Executive Order No. 10973, 22 C.F.R. 121.01, 123.01 and 127.01.

[2]Petitioner, an Austrian citizen and the majority stockholder of Swarolite, Inc., originally was listed as the consignee of the camera, but that designation was withdrawn when the State Department refused to issue an export license because Swarolite would not state the intended use of the camera.

The agents kept petitioner under surveillance and followed him to New York City. They learned that petitioner had made reservations for a Lufthansa flight to Munich; when he failed to check in for that flight, agents discovered that petitioner already had checked in for a Pan American Airlines flight scheduled to depart one hour earlier. A Customs agent located petitioner's luggage (which had been checked for departure) and opened one suitcase, in which he discovered the camera. He closed the suitcase and took it, with petitioner's remaining luggage, to the passenger area.

Meanwhile, other agents followed petitioner into the boarding area. They identified themselves to petitioner and asked him several questions, including whether he had purchased anything with a value in excess of $250.00 and whether he had any items requiring a shipper's export declaration or a State Department export license. Petitioner answered "no" to each question. He later stated that he had purchased a camera, but he denied knowing its value. The agents escorted petitioner to a separate room, where petitioner identified his luggage. The suitcase containing the camera was opened; petitioner then admitted that he did not have the necessary export license. Customs agents arrested him and gave him *Miranda* warnings. Petitioner made one inculpatory statement later that day at the Customs office and a second statement the following day at the United States Courthouse.

2. Petitioner moved to suppress the camera, several seized documents, and his statements. The district court refused to suppress the real evidence. It concluded that the search of petitioner's suitcase was authorized by 22 U.S.C. 401, which permits Customs officers, acting on probable cause, to seize military equipment intended to be exported unlawfully (Pet. App. 40a-45a, 63a). The court

held, however, that the agents were not authorized to arrest petitioner, because federal law does not specifically authorize Customs agents to make arrests in connection with unlawful exports and because the agents were not entitled to make the arrest under the law of New York (*id.* at 57a-63a). The court suppressed petitioner's post-arrest statements, finding them to be the fruit of an unlawful arrest.

The United States filed an interlocutory appeal, pursuant to 18 U.S.C. 3731, from the suppression order, and the court of appeals reversed. After thoroughly discussing the law of arrest in New York, the panel held that state law authorized the Customs agents to arrest petitioner for a federal felony committed in their presence. The court declined to consider petitioner's argument that the search of his luggage was illegal, explaining that the argument was "not independent grounds supporting the district court's suppression" order (Pet. App. 20a).

ARGUMENT

Petitioner's arguments are premature. The decision of the court of appeals has placed petitioner in the same position he would have occupied if the district court had denied his motion to suppress. A denial of a motion to suppress could not have been reviewed before trial. *Abney* v. *United States*, 431 U.S. 651, 659, 663; *DiBella* v. *United States*, 369 U.S. 121. Petitioner might be acquitted at trial, in which case his claim would be moot. On the other hand, if he should be convicted and his conviction should be affirmed, he would be able to present all of his arguments—those concerning suppression as well as any others that may arise out of the trial—to this Court in a petition for certiorari seeking review of the final judgment. *American Foreign S.S. Co.* v. *Matise*,

423 U.S. 150, 155. There is no reason for piecemeal review of petitioner's contentions, which are, in any event, unpersuasive.

1. The central question addressed by the court of appeals was whether New York law authorized the Customs agents to arrest petitioner. Although the *authority* of the agents to make the arrest here turned on state law,[3] we doubt that the propriety of suppression of petitioner's voluntary statements should do so. Statements voluntarily made by a person are admissible in evidence unless the Constitution, a federal statute, or a formal rule calls for their exclusion. 18 U.S.C. 3501; Fed. R. Evid. 402. This Court has held several times that the application of an exclusionary rule is not the proper response to a violation of a state statute.[4] Consequently, we submit that the lawfulness of the arrest under New York law is not dispositive here. Petitioner does not argue that the Constitution required a warrant to arrest him or that the Customs agents lacked probable cause to do so,[5] and the arrest therefore comported with the Constitution. The statements petitioner voluntarily gave after his constitutionally permissible arrest are admissible in evidence.

But however that may be, the court of appeals carefully analyzed New York law and concluded that it authorized the arrest of petitioner (Pet. App. 6a-20a). We rely on its opinion, which not only follows an unbroken line of

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[3]See *United States* v. *Watson*, 423 U.S. 411, 420-421 n. 8; *United States* v. *Di Re*, 332 U.S. 581, 589.

[4]See, *e.g.*, *Rios* v. *United States*, 364 U.S. 253, 260-261; *Preston* v. *United States*, 376 U.S. 364, 366; *Cady* v. *Dombrowski*, 413 U.S. 433, 449.

[5]See also the discussion at pages 6-7, *infra*.

authority in the court of appeals[6] but also adheres to the clear implication of a decision by the State's highest court.[7] There is no reason for this Court to review what is, at most, a question of state law. *Baggett* v. *Bullitt*, 377 U.S. 360, 376-377; *Bishop* v. *Wood*, 426 U.S. 341, 345-346.

2. Petitioner also contends that the court of appeals should have considered alternative arguments that he offered in support of the suppression order. The court of appeals recognized, as was required (see *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479), that petitioner could assert any "independent grounds supporting the district court's suppression" (Pet. App. 20a). The arguments petitioner presented, however, did not support suppression of his voluntary statements, and the court of appeals therefore was not required to consider them.

Petitioner argued, for example, that his luggage was not properly opened at the airport because of the absence of a warrant, an argument that the district court rejected in concluding that the physical evidence is admissible (Pet. App. 40a-52a). But even if the search were improper, the impropriety would furnish grounds for suppression of petitioner's voluntary statements only if (i) there would not have been probable cause to arrest him in the absence of the discovery of the camera during the search, and (ii) the search was so close to the statements in a causal chain that the statements properly could be seen as the "fruit" of the search. See *Brown* v. *Illinois*, 422 U.S. 590.

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[6] *Marsh* v. *United States*, 29 F. 2d 172 (C.A. 2); *United States* v. *Lindefeld*, 142 F. 2d 829 (C.A. 2); *United States* v. *Burgos*, 269 F. 2d 763 (C.A. 2); *United States* v. *Rosse*, 418 F. 2d 38 (C.A. 2), certiorari denied, 397 U.S. 998.

[7] *People* v. *Floyd*, 26 N.Y. 2d 558, 561, 312 N.Y.S. 2d 193, 194, discussed at Pet. App. 12a-14a.

Here the agents unquestionably had probable cause to arrest petitioner wholly apart from finding the camera in his luggage; they had seen him take possession of the camera and transport it to New York, where he made misleading plane reservations in an apparent attempt to leave the country without detection. The agents were entitled to conclude that it was more likely than not that petitioner was taking the camera with him, and the confirmation of that fact by opening his luggage was not essential to the establishment of probable cause (indeed, petitioner does not deny that there was probable cause to believe the camera was in his luggage). Moreover, petitioner gave his statements only after an opportunity for reflection (one of them was given the day after the arrest), and they should not be suppressed even if the search was one link in the causal chain leading to them.[8]

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[8] In any event, the district court properly rejected petitioner's argument that the search of his bag was unconstitutional. The search was conducted at the border, and border searches are a recognized exception to the Warrant Clause of the Fourth Amendment. *United States* v. *Ramsey*, 431 U.S. 606. Although the border search authority usually is applied in the case of incoming articles, Congress decided that searches for certain items of military value that might be exported also were necessary, and it authorized the Customs Service to conduct them (see Pet. App. 41a-46a and 22 U.S.C. 401(a)). The border search authority applies to searche of outgoing articles (*United States* v. *Stanley*, 545 F. 2d 661 (C.A. 9); *Samora* v. *United States*, 406 F. 2d 1095 (C.A. 5)), and the search of petitioner's luggage on probable cause therefore complied with the Fourth Amendment.

The propriety of the search and arrest also might be founded on the exigent circumstances surrounding them: petitioner and his luggage were about to depart from the United States, and unless the luggage had been seized (and petitioner arrested) at once, it would have been too late. If, as petitioner contends, inspection of the contents of his luggage was an essential foundation for his arrest, then the agents were entitled not only to seize the luggage but to open it before petitioner's plane left the country. (*United States* v. *Chadwick*, No. 75-1721, decided June 21, 1977, on which petitioner

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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relies, involved neither a border search nor an on-the-spot opening of luggage under exigent circumstances. *Chadwick* involved, instead, a search after a footlocker had been removed to a federal building.)

Petitioner contends (Pet. 7-9) that suppression of his voluntary statements nevertheless is appropriate because the first opening of his luggage was "kept secret" from the Assistant United States Attorney responsible for the case. Petitioner does not refer to the record, and so we cannot ascertain in what way he believes the search was "kept secret" from the prosecutor. It was freely admitted by the agents during their testimony, and it is not uncommon for prosecutors to be unacquainted with some of the details of a case until shortly before suppression hearings. At all events, petitioner does not demonstrate how this "secrecy" harmed him.